

1 JOHNNY L. SMALL
2 CDC# J-44318
3 P.O. BOX. 1050
4 SALINAS VALLEY STATE PRISON
5 SOLEDAD, CA. 93960-1050
6 In Pro Per

Filed

JUL 31 2008

**RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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12 JOHNNY L. SMALL 3 CU7-5133 RMW (PR)

13 Petition) OBJECTION TO RESPONDENT'S
14) ANSWER TO WRIT OF HABEAS
15 vs.) CORPUS
16)
17 M.S. EVANS, (Warden))
18 Respondent)

19
20 To the United States District Court Judge. ~~██████████~~ for
21 the Northern District of California, San Jose Division.

23 Petitioner Johnny L. Small, a California prisoner, files this
24 traverse/objection to the respondent answer to petitioner writ
25 of habeas corpus.

26 1) Petitioner objects to respondent answer that petitioner
27 is lawfully in the custody of respondent within the meaning of
28 the federal habeas corpus statute, 28 U.S.C. § 2241 (c)(3) and
2254 (d), pursuant to a valid judgment of the Santa Clara County

1 Superior Court, a jury having found petitioner guilty of aggrav-
2 ated sexual assault of a child under the age of 14 and 10 years
3 younger than petitioner. (Cal. Pen. Code § 269, subd.(a)), and that
4 he committed forcible rape (Cal. Pen. Code § 261, subd.(a)(2);
5 Count 1), and forcible oral copulation (Cal. Pen. Code § 288a,
6 subd.(c)(2); Count 2); lewd and lascivious acts on a child under
7 the age of 14 (Cal. Pen. Code § 288, subd.(a)), during which peti-
8 tioner had substantial sexual contact with a minor victim, (Cal.
9 Pen. Code, § 1203.066, subd. (a)(8));--oral copulation with a minor
10 under the age of 16, (Cal. Pen. Code § 288a, subd.(b)(2)); sexual
11 penetration of a person under the age of 16 by a defendant over
12 21 (Cal. Pen. Code, § 289, subd.(i)); and a lewd and lascivious
13 act on a child under the age of 14 or 15. (Cal. Pen. Code § 288,
14 subd. (c)(1)). Ct. 74-80.)

15 2. Petitioner objects to the sentence imposed by the
16 court, to be served 18 years 8 months and a consecutive, indeter-
17 minate term of 60 years to life. (Ct. 383-384.)

18

19 T.

20 Petitioner Constitutional rights was violated because the
21 evidence did not support the convictions. Petitioner due process
22 was denied when the Superior Court found there was sufficient
23 evidence to stand trial. Although, preliminary hearing is not
24 mandatory and no constitutional right to a preliminary hearing,
25 for the sake of argument, petitioner has a constitutional right
26 to effective assistance of counsel and his failure to file for
27 dismissal by making a motion pursuant of California Penal Code
28 § 995. This in violation of petitioner 6th amendment right to

1 effective assistance of counsel. Petitioner has argued Ineffect-
2 ive Assistance of Counsel in all respect to his appeal. (Strick-
3 -land v. Washington, 466 U.S. 668, 687-688, 695-696 (1984)).

4 II.

5 Petitioner objects to respondents answer asserting that the
6 State Court was not unreasonable in rejecting petitioner suffici-
7 ency of the evidence claim. Claim II and III petitioner argued
8 that the evidence to convict was insufficient. Petitioner was
9 charged and convicted for forcible rape and oral copulation. The
10 record indicate that he alleged victim not only recanted in Court,
11 but also recanted to the district attorney's office. Paris told
12 her mother, (Monica), that petitioner never molested her. Monica
13 tried unsuccessfully to have the charges against petitioner drop-
14 ped. Paris continued to deny petitioner had molested her. She
15 testified that she made up teh story about petitioner because he
16 was hurting her mother by having an affair with a woman named
17 Aisha. (MEM. p. 2). Respondent asserts that petitioner confessed
18 to these allegations of rape and molestation. The pretext tele-
19 phone call was an illegal wire tap that first of all should had
20 never been used against petitioner, therefore petitioner's
21 arrest was by entrapment. Paris was ordered to make the phone
22 call or she and her siblin would be removed from her mothers
23 custody. The interrogation was also illegal due to Paris was un-
24 der age and without her mother present. She was very acceptable
25 to do what detective Powell ordered her to do. Petitioner alleg-
26 ed confession was not admissible in court, and counsel was in-
27 effective by failing to have any statements made by Paris and
28 petitioner suppressed. This violated petitioner due process

1 right to a fair trial. 6th and 14th amendment.

2 Paris inculpating petitioner with her made up story, felt
3 guilty for her actions, therefore recanted by telling the truth,
4 and exculpating petitioner. Sue Process Clause of the Fourteenth
5 Amendment prohibit the conviction of a criminal defendant on in-
6 sufficient evidence. Every element of the alleged offense was
7 not proven beyond a reasonable doubt. (Jackson v. Virginia, 443
8 U.S. 307, 316 (1979). The jury received conflicting testimony
9 from the alleged victim. Evidence presented during trial testi-
10 mony is the facts of the case. No rational trier of fact could
11 have found guilty proven beyond a reasonable doubt, with conflict-
12 ing testimony that inculpated and also exculpated defendant.
13 This case must be set aside and all charges must be dismissed.

14 III.

15 Petitioner objects to respondent answer to grounds IV and V.
16 that his right to due process were violated by failure of the
17 trial court to instruct the jury sua sponte on the meaning of the
18 terms "force" and "forcible." This state courts rejection of pe-
19 titioner's claim is very unreasonable. Petitioner were charged
20 with lewd touching. Count 1, (aggravated sexual assault), and
21 count 4 (lewd touching) were alternative charges to count 1...
22 The same with count 2 (aggravated sexual assault) and count 5
23 (lewd touching) alternative charges. Petitioner contends that
24 the evidence that force was used by oral copulation on the couch.
25 Petitioner could not logically hold Paris hands behind her head
26 to perform oral copulation. This evidence is totally insufficient,
27 and impossible to do. Paris being over 6 feet tall, petitioner
28 amrs reach will not allow him to hold her hands and be able to

1 position himself to perform such an act. The forcible oral cop-
2 ulation charge must be dismissed, not only because the court
3 failed to give definition of force or forcible, there's no way the
4 act could have happened. Paris testified petitioner did not force
5 her. (Rt. 178-79, 324). Kissing on the mouth is not oral copula-
6 tion. Its very impossible to hold Paris hands and oral copulate
7 her while lying on her back. She is over 6 feet tall. (Rt.179,
8 324). The element of force not present. Petitioner cited case
9 law that was contrary to the Superior Courts ruling. California
10 Supreme Court, pending case (People v. Griffin, review granted
11 Oct. 23, 2002. S109734.) "force" has a specialized meaning requir-
12 ing a jury instruction in a rape case. Reversal and remand order
13 for dismissal.

14 IV.
15

16 Petitioner objects to respondent's answer contending that
17 the State Court was not unreasonable in rejecting petitioner claim
18 that he was denied due process by the failure to instruct the
19 jury that it could only convict him of the less serious of two
20 offenses. Respondent answer is very unreasonable and the courts
21 was also unreasonable in rejecting petitioner's claim. In claim
22 six, seven, and eight , the trial court failure to instruct the
23 jury that it could only convict petitioner of the less serious
24 offensesm violated petitioner due process. Petitioner consolidate
25 his argument on writ of habeas, and objects to respondents answer.
26 The alternative counts and lesser included offenses. The jury
27 found petitioner guilty of counts one and two, aggravated sexual
28 assault involving forcible rape and forcible oral copulation,

1 (Cal. Pen. Code §260, subd.(a)), in that he committed forcible
2 rape (Cal. Pen. Code §261, subd.(a)(2); count 1), and forcible
3 oral copulation (Cal. Pen. Code §288a, subd. (c)(2); count 2).

4
5 V.
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7 Petitioner claim nine contends that trial court had a sua
8 sponte duty to instruct the jury on lesser included offense and
9 that its failure to do so denied petitioner of his due process.
10 Petitioner incorporates his original arugment within his petition,
11 writ of habeas corpus.. Petitioners objects to respondents answer.

12
13 VI.
14

15 Petitioner object to respondents answer stating that the state
16 court was not unreasonable in rejecting his claim that counsel per-
17 formance was ineffective. Counsel failure to present evidence of
18 an alibi defense or in conducting his preliminary hearing; notify-
19 ing petitioner of the charges; and in failing ot challenge the
20 specificity of the charges. Petitioner consolidate his writ of
21 habeas argument, for the District Court Judge review.
22

23
24 VII.
25

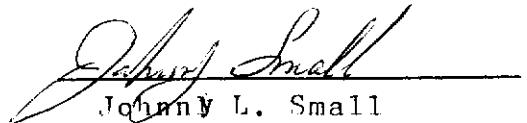
26 Petitioner objects to respondents answer as well for Ineffe-
27 ctiveness of Appellate Counsel. By consolidation of petitioners
28 writ of habeas corpus argument. This claim has merits and request
De Novo Review.

29
30 VIII.
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32 Petitioner pray that this court review this case and grant
33 petitioner's writ. Petitioner is unlawfully incarcerated.
34

35 Date: July 29th 2008.
36
37

Respectfully


Johnny L. Small

DEPARTMENT OF JUSTICE

Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-3664

TO

Johnny L. Small
J - 44318
Salinas Valley State Prison
B3-145 L
P.O. Box 1060
Soledad, CA 93960-1060

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(C.C.P. SEC. 466 & 2015.5; 28 U.S.C. SEC 1746)

I, Johnny Small, declare under penalty of perjury that: I am the Innocent Petition in the above entitled action; I have read the foregoing documents and know the contents thereof and the same is true of my own knowledge, except as to matters stated therein upon information, and belief, and as to those matters, I believe they are true.

Executed this 29th day of July, 2008, at Salinas Valley State Prison, Soledad, CA 93960-1050.

(Signature) Johnny Small
DECLARANT/PRISONER

PROOF OF SERVICE BY MAIL

I, Johnny Small, am a resident of California State Prison, I the County of Monterey, State of California; I am over the age of eighteen (18) years and am/am not a party of the above entitled action. My state prison address is: P.O. Box 1050, Soledad, CA 93960-1050.

On July 29th, 2008, I served the foregoing: objection to Respondents' Answer to writ of habeas Corpus.

(Set forth exact title of document(s) served)

On the party(s) herein by placing a true copy(s) thereof, enclosed in sealed envelope(s), with postage thereof fully paid, in the United States Mail, in a deposit box so provided at Salinas Valley State Prison, Soledad, CA 93960-1050.

U.S. District Court, Northern district of California } Attorney General Office
Judge Ronald M. Whyte } 455 Golden Gate Avenue, Suite 1000
280 South First Street, Room #2112 } San Francisco, Ca. 94102-3604
- And - }
San Jose, Ca. 95113-3085

(List parties served)

There is delivery service by United States Mail at the place so addressed, and/or there is regular communication by mail between the place of mailing and the place so addressed.

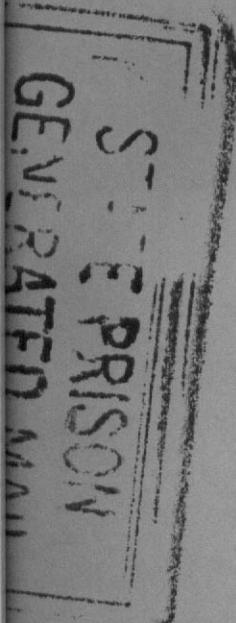
I declare under penalty of perjury that the foregoing is true and correct.

DATED: July 29th, 2008

Johnny Small
DECLARANT/PRISONER

Mr. Johnny L. Small #J-44348
Salinas Valley State Prison - B3-245^c
P.O. Box 1050
Soledad, Ca. 93960-1050

TO: Court Clerk - U.S. District Court
Northern District of California
280 S. First Street - Room #211
San Jose, Ca. 95113-3095



C/GS, Rev

7-29-08

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